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October 4, 2002

Mr. David Kaiser
Federal Consistency Coordinator
Coastal Programs Division
Office of Ocean and Coastal Resource Management
National Oceanic and Atmospheric Administration
1305 East-West Highway, 11th Floor (N/ORM3)
Silver Spring, Maryland 20910

RE: National Oceanic and Atmospheric Administration - Office of Ocean and Coastal Resource Management - Advanced Notice of Proposed Rule Making - Procedural Changes to the Federal Consistency Process - 67 *Federal Register* 44407 - 44410, July 2, 2002 and 67 *Federal Register* 51800, August 9, 2002

SAI: FL200208282742C

Dear Mr. Kaiser:

As lead agency for the Florida Coastal Management Program, the Florida Department of Environmental Protection has coordinated a review of the above-captioned Advanced Notice of Proposed Rulemaking (ANPR). The ANPR seeks comments on a number of specific questions, the answers to which will be used to determine whether limited or specific procedural changes or guidance to the existing Federal consistency regulations are needed to improve the efficiency of Federal consistency procedures and the Secretarial appeals process, particularly for energy development on the Outer Continental Shelf (OCS).

The ANPR indicates that the current effort was prompted, in part, by a statement in the National Energy Policy report (NEP) that noted a "potential lack of effectiveness in the CZMA-OCSLA interaction resulting from a lack of clearly defined requirements and information needs from Federal and State entities, as well as uncertain deadlines for completing the procedures of both statutes."¹ The report does not, however, provide any information to support the suggested lack of effectiveness between the CZMA and the Outer Continental Shelf Lands Act (OCSLA).

67 Fed. Reg. 44,408-44,410 (2002) (proposed July 2, 2002), citing NAT'L ENG. POL'Y DEV. GROUP, NAT'L ENG. POL'Y REP. at 5-7 (May 2001).

Less than two years ago, NOAA completed an extensive review and modification of the Federal consistency regulations, culminating in the adoption of a revised rule in January 2000. The information presented in the ANPR does not suggest that difficulties have arisen from implementation of the new rule. To the contrary, the overview of the consistency process provided in the ANPR emphasizes the effectiveness of the existing coordination between CZMA consistency reviews and the approval of energy projects under the OCSLA.

In the history of the CZMA, there have been only 15 instances where the oil and gas industry appealed a State's Federal Consistency objection to the Secretary of Commerce. Of those 15 cases [2 Development & Production Plans and 13 Exploration Plans], there were 7 decisions to override the State's objection, 7 decisions not to override the State, and 1 decision pending. The record shows that energy development continues to occur, while reasonable State review ensures that the CZMA objectives have been met.²

Based on the foregoing facts, there is not an apparent need for additional rulemaking. If NOAA believes the subject warrants further consideration, however, the State of Florida would prefer the establishment of a federal-state consultative process to ascertain the issues of concern and obtain supportive information to document the extent to which any problems noted should be addressed by rule amendment. Clarification would also be needed to address the applicability of any proposed rule change to non-energy projects.

In response to the specific questions posed by NOAA in the ANPR, the state has the following comments:

Whether NOAA needs to further describe the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements.

The nature and scope of information required for state consistency review is adequately addressed by NOAA at 15 C.F.R. §§ 930.39, 930.58 and 930.76 (2002); additional regulations are not needed. Florida's experience suggests that many federal project managers are not aware of (or do not fully understand) the requirements of the CZMA or the information needed to initiate state consistency review. The information submitted to the affected state is often based on materials developed in response to the requirements of other states with different enforceable policies. The problem is often complicated by a failure to budget sufficient time for consistency review in the project timetable or to submit information required by 15 C.F.R. § 930. When either of those events occur, the state's request for the information is often erroneously viewed by the federal agency and applicant as the cause of project delays.

NOAA could improve the federal consistency process by providing more training and technical assistance to federal agencies on the requirements in the existing consistency rules. A good example of effective coordination is that conducted by the Minerals Management Service's Gulf of Mexico Region, which consulted with each coastal state to compile a list of data and information needed for consistency reviews.

- 2 *Whether a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA sections 307(c)(3)(A), (B) and 307(d) can be established taking into consideration the standards of the Administrative Procedures Act and which, if any, Federal environmental reviews should be included in the administrative record to meet those standards.*

The existing timeframe requires the Secretary of Commerce to issue his or her decision on an appeal within 90 days following the completion of the record, with a possible 45-day extension. It is uncertain how a more definitive date for the decision could be established, unless the time for developing and filing an adequate record on appeal is limited. As noted in NOAA's new Final Rule on CZMA Federal Consistency Regulations, "appeals to the Secretary result in the development of extensive administrative records containing information never reviewed by the State agency."³

The time necessary for development of an adequate record should not be limited. The existing procedures provide the flexibility needed to develop a record that adequately supports the Secretary's thoughtful consideration of issues that could differ greatly from the basis of the state's consistency objection. State objections are based on the proposed activity's compliance with enforceable policies contained in the state's coastal management program. An appeal to the Secretary, however, is based on (a) whether the activity furthers the national interest, (2) whether the national interest furthered by the activity outweighs its adverse effects, (3) the availability of reasonable alternatives and (4) national security.

Limiting the time needed to develop an adequate record could bias the appellate process in favor of the appellant. For example, abbreviated timeframes could deny parties the opportunity to adequately respond to new information raised during the appeal. Limited response time could also preclude the Secretary's full consideration of additional information that could better explain the effects of the proposed activity, the extent of its contribution to the national interest, and its national security implications.

65 Fed. Reg. 77,151 (December 2000)

- 3 *Whether there is a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA.*

While the existing consistency regulations “encourage” Federal agencies to coordinate compliance with the CZMA and the National Environmental Policy Act (NEPA), appropriate synchronization of reviews conducted under those acts rarely occurs. Affected states are often required to complete the CZM consistency review of a proposed project without the benefit of the draft NEPA document – the most comprehensive and definitive environmental analysis of the proposed activity. NOAA could improve the current level of coordination and synchronization by requiring NEPA documents as necessary data and information for the consistency review of all projects, including OCS projects.

4. *Whether a regulatory provision for a “general negative determination,” similar to the existing regulation for “general consistency determinations,” 15 CFR 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, would improve the efficiency of the Federal consistency process.*

A general negative determination that a federal agency could apply anywhere would be problematic. The difficulties associated with creating an effective general authorization can be illustrated by the problems encountered in the development and implementation of the Corps of Engineers’ nationwide permit program. To address the varying environmental conditions and enforceable policies of the states, the current nationwide permits are heavily conditioned with detailed provisions negotiated state-by-state. The complexities of nationwide permits may be responsible for an increase in the number of individual permits being sought in some parts of the country. The time required to develop the conditions and exclusions needed to create a workable general negative determination would probably exceed the time needed to develop project-specific negative determinations.

Federal agencies and states have other mechanisms to ensure that appropriate activities are reviewed for consistency. State programs identify activities presumed to affect a state’s coastal resources. Federal agencies can consult directly with a state to determine the specific activities the state needs to review. Amendments to 15 C.F.R. 930 are not needed to simplify and streamline consistency reviews. More process without additional protection would be the likely result.

5. *Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the "listing" and "geographic location" descriptions in 15 CFR 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore.*

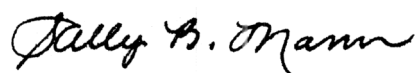
The CZMA establishes an *effects-based* evaluation process rather than categorizing activities based on geographic location or type. It would be extremely difficult to craft regulations or other guidance that would allow a state or federal agency to determine whether a proposed class of federal action would affect a state's coastal resources. Effects cannot be determined without a detailed understanding of the exact nature, scope and location of the proposed federal action, the resources in the affected area, the nature of current or future projects that may also impact the affected area, and the enforceable policies included in the state's CMP. It would be particularly difficult to develop geographic criteria for activities conducted in the open ocean, where effects can occur hundreds of miles from the point of origin.

6. *Whether multiple federal approvals needed for an OCS EP [exploration plan] or DPP [development and production plan] should be or can be consolidated into a single consistency review. For instance, in addition to the permits described in detail in EPs and DPPs, whether other associated approvals, air and water permits not "described in detail" in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP.*

The existing federal consistency regulations allow states to consolidate multiple federal approvals needed for EPs and DPPs. Therefore, additional rulemaking is not needed.

The state appreciates NOAA's decision to solicit the views of affected states on the need for changes to the federal consistency rules. We look forward to receiving a response to our comments and recommendations. For additional information or assistance in the meantime, please contact Ms. Lynn Griffin or Ms. Jasmin Raffington at (850) 245-2161.

Yours sincerely,



Sally B. Mann, Director
Office of Intergovernmental Programs

SBM/jr